CHESTER BAKER

IBLA 76-421 Decided August 18, 1976

Appeal from decision of Administrative Law Judge John R. Rampton, Jr. overruling a decision of BLM District Manager denying an application for permit to graze horses 36-02-74-2.

Affirmed.

1. Act of December 15, 1971 -- Grazing Permits and Leases: Generally -- Wild Free-Roaming Horses and Burros Act

A District Manager's decision denying a grazing permit for 10 domestic horses, based on the fact that such a denial was required for proper range management and for protection of wild horses under the Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, will be overruled where evidence presented at a hearing shows that granting the permit will not interfere with BLM's management of the wild horses under the Act.

APPEARANCES: Lawrence E. Cox, Esq., Office of the Solicitor, Portland Region, Portland, Oregon, for appellant, the Bureau of Land Management; Irvin D. Smith, Esq., Burns, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On January 15, 1974, the Bureau of Land Management, District Manager, Burns District (BLM), issued a decision which sustained the final recommendation of the District Advisory Board denying Chester Baker's application for a permit to graze 10 horses from April 1, 1974, through October 31, 1974, in the Oakerman Lakes Allotment, Sagehen use area. The basis for this denial was that such action was necessary to provide for the orderly administration

of the national resource land and to provide for protection, management and control of wild, free-roaming horses and burros as required by the Wild Free-Roaming Horses and Burros Act (the Act), 85 Stat. 649-651, 16 U.S.C. §§ 1331-1340 (Supp. IV, 1974), and 43 CFR 4112.2. The decision allowed him to convert the 70 AUM's to cattle use. Baker appealed this decision and a hearing was held before Administrative Law Judge John R. Rampton, Jr., in Burns, Oregon, on May 22, 1975.

Testimony at the hearing showed that the Sagehen area is about 15 miles from east to west, 10 miles from north to south and is completely fenced (Tr. 12-15, 24). Sagehen Canyon divides the area into east and west portions (Tr. 12). On the west side of the allotment, two fences run north and south (Tr. 13).

Baker testified that he has had a license for horses in the allotment since 1934 (Tr. 14). He said that he has always grazed his horses in the same area, east of Sagehen Canyon (Tr. 12, 14). According to Baker, horses tend to localize themselves, rather than migrate great distances, if adequate feed and water are available (Tr. 15). Baker said that his horses remain isolated by choice and also because of the natural barrier formed by Sagehen Canyon (Tr. 17). He did admit that it was possible for stock to move across the canyon, but testified he has never seen his horses west of the canyon (Tr. 14, 20). He said that he has seen other horses on the west side of the allotment, west of the fence (Tr. 14, 15). To his knowledge, there are no unclaimed horses east of the canyon (Tr. 14, 17). Baker submitted that the running of private horses would in no way affect the government management of any unclaimed or wild roaming horses (Tr. 7).

Don Miller, a rancher owning property north of the allotment, has been familiar with the area since 1948 (Tr. 26). He testified that he has never seen horses cross Sagehen Canyon and has never seen Baker's horses west of the canyon (Tr. 27). He estimated that there are about five to eight wild horses on the west side and that these horses are about 12 miles from Baker's horses (Tr. 28, 30).

Chad Bacon, Area Manager, Burns, testified on behalf of BLM. After the regulations implementing the law relating to free-roaming horses became effective, Bacon recommended to the District Manager that the BLM remove licensed horse use from the Oakerman Lakes Allotment. He said he did this because, in his judgment, domestic horse use was not compatible with the management of wild horses (Tr. 46), Bacon contended that the canyon is not a natural barrier, as some areas are passable (Tr. 44). He testified that he cannot readily distinguish or identify wild horses in the field; it is necessary to get very close to the horse to tell whether it has a brand (Tr. 46). To be a wild horse under the law, he explained, such horse must be unclaimed and unbranded (Tr. 46). Inventories conducted by Bacon

from a helicopter in January of 1974 and 1975, showed 12 horses on the west side of the allotment for both counts (Tr. 50-51). Bacon said that there is adequate forage and range west of the canyon for these animals (Tr. 51). He admitted that he has not seen Baker's horses west of the canyon (Tr. 50).

L. Christian Vosler, District Manager, made the decision under the Act to close any allotment where there were wild and free-roaming horses, any areas suspected to have wild horses, and any community allotments. He testified that the basis of the decision was that under the law he was charged to manage and protect wild, free-roaming horses on public lands within his jurisdiction (Tr. 60-61). He felt that it was necessary to ascertain the number of wild horses and their location, "so that we could get an inventory and classification of these animals" (Tr. 61). He explained that they had to have control of the domestic horses and that this allotment was one that could be eliminated from domestic horse use (Tr. 61). He indicated this was necessary for the determination of management plans for wild and free-roaming horses under the Act (Tr. 61). Vosler testified that he had to close the east as well as the west portion of the allotment because the canyon is not a permanent boundary (Tr. 62). He said there was no reason why Baker's horses could not go west of the canyon, although he admitted that he did not know of any occasion when they had gone to the west portion (Tr. 65). He said he assumes that with adequate food and water, the animals will stay in one place (Tr. 64). He admitted that the canyon appeared to be a barrier (Tr. 64).

In his decision of December 3, 1975, the Judge made the following finding:

> Thus, the canyon, plus the two fences, would appear to effectively prevent any mingling of the wild horses with the domestic horses. I find that the likelihood or possibility of intermingling of the wild and domestic horses is so remote that it would not frustrate the ability of any range management program to provide for protection, management and control of wild, free-roaming horses under Public Law 92-195.

The Judge concluded that the District Manager's decision was without a rational basis and overruled it.

On appeal from that decision 1/ the BLM argues: The function of determining the propriety of segregating certain areas of the

1/ The Administrative Law Judge's opinion decided three cases which had been consolidated for hearing and decision. This appeal concerns only that portion of the case applying to Chester Baker 36-02-74-2.

Federal Range for use by a particular class of stock is a function committed to those charged with the administration of the Taylor Grazing Act, (Elmer Nielson, A-24107 (July 5, 1945), IGD 423); 43 CFR 4112.2; the burden of proof in an appeal from a decision of the District Manager rests on the appellant (E. L. Cord, 64 I.D. 232 (1957) and United States v. Maher, 79 I.D. 109 (1972)); the District Manager's decision to close the land to grazing of domestic horses was necessary to implement the Act which provides in part:

> It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands. 16 U.S.C. § 1331 (Supp. IV, 1974).

BLM explained that closure was the first step in the development of a management plan. BLM deemed it essential to close all areas where wild and domestic horses could mix. This was the initial step to the identification and location process and without this action, no proper management plan could be created. BLM stated that to question this line of reasoning, Baker had to show by substantial competent evidence that he had met the stringent burden of proof required to demonstrate that the December 11, 1973, decision was not supported by any rational basis. BLM submits that Baker failed to meet this burden.

[1] It is well settled, as stated by BLM, that the function of determining the propriety of segregating certain areas of the Federal Range for use by a particular class of stock is a function committed to those charged with the administration of the Taylor Grazing Act. In executing this charge, however, BLM's decisions must be supportable on a rational basis. We find that the District Manager's decision was not. BLM insists that closure of the allotment to domestic horses is a necessary initial step in devising a management plan pursuant to the law for the protection of wild horses. The testimony shows, and BLM admits that Baker's horses have not been known to graze west of the canyon. Thus, to deny Baker a permit to graze his horses will in no way help BLM in its identification of wild horses. 2/ Neither concern for the adequacy

2/ Baker's case may be compared with the Rock Creek Ranch c/o Don Miller, and Rock Creek Ranch cases which were consolidated with the Baker case. The Judge noted in his decision denying these appellants their application for domestic horse use that their cases differed from Baker's. The Judge stated that in these cases, unlike Baker's, there was a large number of horses present in the unit that, although claimed by Rock Creek Ranch, had not been gathered and the number of wild or unclaimed horses within the unit was still undetermined.

of the food supply for the horses nor concern for the condition of the Federal Range formed the basis of the District Manager's decision. The main reason for denying the permit was predicated on the fact that closure of the allotment to domestic horses was a necessary step in the formulation of a management plan to protect the wild horses. Given the fact that Baker's horses do not mingle with the wild horses, closure of the allotment to domestic horses is not reasonable.

We find that Baker did sustain his burden of showing that the District Manager's decision was without a rational basis. The testimony at the hearing demonstrated that Baker's horses did not cross the canyon and did not interfere with the BLM's management of the wild horses. Therefore, the denial of the grazing permit was not proper.

We do not find that issuing a permit to Baker to graze domestic horses in any way violates the intent of the Act. Section 1 of the Act stresses protection of unbranded and unclaimed horses and burros. In Kleppe v. State of New Mexico, 44 LW 4878 (1976), 3/ the court emphasized that by enacting the Wild Free-Roaming Horses and Burros Act, Congress was determined to preserve and protect these animals on the public lands of the United States from acts of violence and misuse. The Senate Interior and Insular Affairs Committee in its report of the Act noted:

> During the course of this century, the wild horse population has dwindled to a minuscule fraction of the estimated 2 million that once roamed the western plains and mountains. They have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. They have been used for target practice and harassed for "sport" and profit. In spite of public outrage, this bloody traffic continues unabated, and it is the firm belief of the committee that this senseless slaughter must be brought to an end.

3/ In this case, the Supreme Court reversed a judgment of the United States District Court for the District of New Mexico (406 F. Supp. 1237 (1975)) which held that the Act was unconstitutional since it could not be sustained either under the territorial clause or the commerce clause of the Constitution. The Supreme Court held that as applied to this case, the Act is a constitutional exercise of congressional power under the Property Clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art. IV, § 3, cl. 2.

Senate Rep. No. 92-242, 1971 U.S. Code Cong. and Adm. News at 2149-2150.

These are the types of atrocities the legislators sought to prevent. We do not see how the Bureau's task of preventing such cruelties will be impeded by granting Baker his permit.

The Act instructs us to consider the animals in the area where they are presently found, as an integral part of the natural system of the public lands. The original version of Senate bill 116 (which passed in lieu of the House bill) contained a provision for specific ranges as a management tool for the protection of the animals, but that provision was eliminated by the committee. The committee elaborates:

> During the course of the April 20 hearing, witnesses repeatedly urged that the wild free-roaming horses and burros be considered a part of the multiple-use system of the public lands and not be placed in set-aside areas for their exclusive use. Testimony by administration witnesses indicated that the animals are already given consideration when programs are formulated for resource use and allocation and the committee believes that this practice should continue. The principal goal of this legislation is to provide for the protection of the animals from man and not the single use management of areas for the benefit of wild free-roaming horses and burros. It is the intent of the committee that the wild free-roaming horses and burros be specifically incorporated as a component of the multiple-use management plans governing the use of the public lands. (Emphasis supplied.)

Senate Rep. No. 92-242, 1971 U.S. Code Cong. and Adm. News at 2151.

We find that the situation in this case exemplifies the intent of the committee. Evidence at the hearing showed that the wild horses are presently found on the west side of the canyon, and Baker's domestic horses on the east side. Since the domestic horses are not harming the wild ones, it seems reasonable that both types of horses can use this allotment under the multiple-use concept.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge